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IN THE.

Supreme Court of the United States

October Term, 1964.
No. 250

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

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ARGUMENT.

When reduced to its essentials the Appellee's Motion to Dismiss is recognizable as an imaginatively conceived but ill-disguised dilatory plea. Because of an action taken by the California Supreme Court on July 30 (discussed in Point I below), its dilatory character is even more apparent now than it was when originally proposed and filed. When the grave and pressing issues of legislative apportionment and the integrity of the individual's right to vote are presented, purely dilatory motions should not prevail.

Each argument put forward by Appellee can and will be refuted.

I.

A Recent Development in California Legislative Apportionment Litigation.

The Notice of Appeal in the within proceeding was filed prior to the decision on June 15, 1964, of the Reapportionment Cases; the Jurisdictional Statement was docketed July 6, 1964.

Between these two dates, on June 19, 1964, Appellants filed another Petition for Writ of Mandate with the Supreme Court of California (*Yorty & Bonelli v. Jordan*, Sacramento No. 7582) which was substantially identical with that involved in the present appeal. (A copy of that Petition is attached to Appellee's Motion to Dismiss as its Appendix A.) Appellee, appearing as respondent, advised the California Supreme Court that it would be appropriate for it to take and retain jurisdiction of the new proceeding, but that present action should be limited to retaining jurisdiction to be exercised only if the Legislature fails to take appropriate action. (Motion to Dismiss, Appendix B, p. 2, footnote 1, and p. 17.)

On July 30, 1964, the Supreme Court of California, made the following Minute Order:

"Sac. No. 7582

"In the Supreme Court of the State of
California in Bank
Yorty et al.
v.
Jordan, Secretary of State.

The petition to intervene and the petition for the writ of mandate are denied for the reason that any determination by this court on the ques-

tion of legislative reapportionment would be premature until such time as the Legislature has had an opportunity to consider the matter and to take such action as it may deem to be required pursuant to the expression of the United States Supreme Court in Reynolds v. Sims, 32 U.S.L.W. 4535, and companion cases.

/s/ Gibson
Chief Justice"

In view of the above, the argument of Appellee (Motion to Dismiss, p. 15) that this appeal should be dismissed because of the pendency of the second action in the California Supreme Court is no longer of any force.

The history of legislative apportionment in California is one of consistent and persistent disregard of the rights of the populous areas of the State to adequate representation in the State Senate. Three relatively modest reapportionment initiatives have been turned down at the polls (1948, 1960 and 1962), and the Legislature has on at least three occasions (1951, 1955, and 1957) failed to adopt reapportionment measures granting even slight relief to the citizens of populous counties (Jurisdictional Statement, pp. 6-9; Report of the State of California Study Commission on Senate Apportionment, published February 1962, pp. 11-15). According to press reports, members of the California Legislature are actively and personally urging the Congress to take precipitate action to nullify insofar as possible the effect of the Reapportionment Cases. In view of past history and present attitudes, there is scant if any hope that the California Legislature, in the absence of judicial mandate, can be

expected to initiate the dissolution of the long-treasured prerogatives of its upper house. The quoted Minute Order from the California Supreme Court can therefore be read as virtually assuring even further delay unless the appeal herein results in a prompt decision on the merits.

Surely neither the quoted Minute Order nor the order appealed from can be reconciled with the holding of this Court that "the basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (*Watson v. City of Memphis*, 373 U. S. 526, 533.) Nor can they be harmonized with the statement: "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." (*Reynolds v. Sims*, ... U. S. ...., 84 S. Ct. 1362, 1384.) Indeed, neither the quoted Minute Order nor the order appealed from can stand against the directive that "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." (*Reynolds v. Sims, supra*, U. S. ...., 84 S. Ct., 1393-1394.) Further, the presence of equitable considerations, while they may justify withholding *immediately effective* relief, do not justify the actions of the California Court which in legal effect amounted to a dismissal of the case (*Reynolds v. Sims, supra* .... U. S. ...., 84 S. Ct., 1394.)

II.

Not One of the Suggested Non-Federal Grounds for the State Court's Action Is Adequate to Support That Action.

A. No Substantial or Sufficient Non-Federal Ground Appears in the Petition.

The Supreme Court of California filed no opinion in the matter appealed from. The reason for its summary denial, whether it be the same or different from the quoted Minute Order of July 30, can only be surmised. It is clear, however, that no substantial or sufficient non-federal ground can be found in the Petition itself.

It will be recalled that the basic issue presented to the Supreme Court of California was the claim that the Senate districting laws of the State invidiously discriminated against the appellants and deprived them of the equal protection of the laws. (Jurisdictional Statement, p. 4.) This was unquestionably a Federal issue, and the issue upon which all else turned. The only non-federal question presented in the Petition related to one alternate and severable portion of the relief prayed for: Should the Court, in the event of refusal of the Legislature to enact a new and valid districting law, order future elections for members of the California State Senate to be held in districts established under the last validly enacted senate districting statute (Calif. Stats. 1911, Extra Session, Ch. 37)? A favorable decision on the Federal question was a condition precedent to, and in no way dependent upon, any possible decision as to what kind of relief should be granted by the State Court under State law. The decision of the California Supreme Court, therefore, could

not have rested solely upon any non-federal question presented to it in the pleadings, for the non-federal question would never be before the California Court for decision unless it had first decided the Federal question in accordance with the contentions of the appellants.

In a case where the petition on its face establishes the deprivation of a Federal right, the denial of the petition without opinion strongly suggests that there was, in the view of the State court, no cause of action based on the Federal right. Where an examination of the record shows no substantial or sufficient state ground for the denial, it will be presumed that the state court based its judgment on the law raising the Federal question.

Williams v. Kaiser, 323 U. S. 471, 478;
Klinger v. Missouri, 13 Wall. 257, 263;
Maguire v. Tyler, 8 Wall. 650, 665.

B. No Substantial or Sufficient Non-Federal Ground Is Suggested in the Motion to Dismiss.

(1). Contrary to Appellee's contention (Motion to Dismiss, p. 7), issuance of a writ of mandate would not necessarily disrupt election processes under way. The issuance of the writ could decide the merits of the case, but would not result in a disruption of the elective process unless the writ also granted immediately effective relief. The California Supreme Court in a recent county redistricting case has made use of the device of deciding the merits first and retaining jurisdiction for the purpose of moulding appropriate relief. (*Griffin v. Board of Supervisors*, 60 Cal. 2d 318, 384 P. 2d 421.) It has been held that equitable considera-

tions might withhold "the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.", (*Reynolds v. Sims, supra*, ... U. S. ..., 84 S. Ct., 1394.) The possibility of disrupting the election in process, therefore, was a matter within the California court's own control. It is not a substantial or sufficient non-federal ground upon which the State court's action in refusing to take jurisdiction could have been based. The refusal to take jurisdiction necessarily involved passing on the Federal question involved.

(2) Appellee's argument (Motion to Dismiss, p. 7) that appellants are estopped to press for a reapportionment in the midst of a pending election because they waited six months in commencing their proceeding is not supported by any citation to authority. First of all, Appellants did not limit their prayer for relief to a single election, whether in process or not; the Petition is obviously aimed at all future elections called under the discriminatory statute. Secondly, it is difficult to conceive how any equitable considerations would operate to estop a citizen from asserting at any time the fact that each day a discriminatory law is enforced against him he is being deprived anew of the equal protection of the laws. In any event, the power which the court retained to control the timing of the relief to which appellants are entitled, as further explained in (1), *supra*, makes this supposed non-federal ground for the State court's action both unsubstantial and clearly insufficient.

(3) Appellee's argument (Motion to Dismiss, pp. 7-8) that the pendency of an action in the United States District Court for the Southern District of

California may have supplied a possible non-federal ground for the California Supreme Court's action is insufficient under California law and therefore could not be a sufficient explanation of the California Courts' action. The California Supreme Court has held that the plea of "another action pending" is a plea in abatement and is not favored; that where the matters presented are of great importance, such as statewide elections and statewide affairs, and where the rights to be protected should not be allowed to bog down in litigation, the court should, as a matter of public policy, deny what amounts to a plea in abatement, exercise its original jurisdiction to issue writs of mandamus and make a determination of the question. (*Perry v. Jordan*, 34 Cal. 2d 87, 90-91, 207 P. 2d 47.) In any event, the plea of "another action pending" is not well founded in California practice unless the parties to the two actions are the same. (*Perry v. Jordan, supra*, p. 90.) From the Motion to Dismiss it expressly appears that the parties to the action before the United States District Court are not the same as the parties to the within proceeding. The supposed non-federal ground, being contrary to the State court's own decisions, is clearly an unsubstantial and insufficient basis for the action.

(4) Appellee's argument (Motion to Dismiss, p. 8) that the State court might have acted as it did because it was unable to predict the constitutional standards ultimately decided by this Court in its decisions of June 15 is reminiscent of the majority opinion in *Hearne v. Smylie*, 225 F. Supp. 645 (D.C. Idaho, 1964), which was reversed and sent back for further proceedings by this Court on June 22, 1964 (.... U. S. ...., 84 S. Ct.

1917). The assumption of judicial timidity or indecision suggested by appellee, while unquestionably pure speculation, certainly cannot be regarded as a substantial and sufficient non-federal ground for the State court's action, particularly in view of the determination by this Court that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." (*Reynolds v. Sims, supra*, ... U. S. ...., 84 S. Ct., 1384.)

(5) When the Motion to Dismiss, at page 8, describes the Petition for Writ of Mandate as asking relief which "concededly fails to meet constitutional standards", appellee misunderstands or misstates the meaning of the Petition. The relief requested was in two parts. The first request was to require that the Secretary of State perform no functions with respect to calling elections under the invidiously discriminatory law. There is nothing unconstitutional about granting that kind of relief. The second request was to require that future elections be called under the last validly enacted senate districting law (which is admittedly obsolete, but nevertheless far more equitable than the law under which California law now operates) until the Legislature enacts a valid law. There is nothing unconstitutional about that. This Court approved the action of the Alabama District Court in providing a provisional method of legislative districting pending action by the State Legislature. (*Reynolds v. Sims, supra*, ... U. S. ..., 84 S. Ct., 1394.) It is a characteristic of equitable proceedings that remedies can be tailored to circumstances. *Brown v. Board of Education*, 349 U. S. 294, 300; *Alexander v. Hillman*, 296 U. S. 222, 239.

(6) The California Supreme Court has itself refuted the point made by appellee (Motion to Dismiss, pp. 8-9) that the Supreme Court is not the appropriate place in which to seek relief. First, in *Perry v. Jordan*, 34 Cal. 2d 87, 90-91, 207 P. 2d 47, the Supreme Court of California has stated that it *should* exercise its power to issue writs of mandamus in important cases such as those involving statewide elections. Secondly, in the case of *Yorty and Bonelli v. Anderson*, 60 Cal. 2d 312, 317, 384 P. 2d 417, the California Supreme Court expressly advised appellants that the proper method of raising their point was through filing a petition for writ of mandamus, and citing as authority the following three cases, in each of which the California Supreme Court took original jurisdiction: *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P. 2d 787; *French v. Jordan*, 28 Cal. 2d 765, 172 P. 2d 46; and *Gage v. Jordan*, 23 Cal. 2d 794, 147 P. 2d 387.

It is true that none of these cases asked the Supreme Court to redistrict the State of California. But appellants do not ask the California Supreme Court to redistrict the State, although the California Court had no difficulty in ordering redistricting a county (*Griffin v. Board of Supervisors*, 60 Cal. 2d 318, 384 P. 2d 421). Appellants ask that the chief election officer of the State perform his duties only with respect to valid laws, and that he be required to disregard what appellee now concedes to be invalid laws. There is no action required of the court which cannot be readily handled by the Supreme Court of California as a matter within its original jurisdiction.

This argument of appellee, therefore, could not have been one that influenced the California Supreme Court,

for the argument is contrary to the Court's own opinions and assumes, contrary to fact, that the California court would be called upon to reapportion the State. There is no substantial or sufficient non-federal ground present in this purely hypothetical argument.

(7) The argument (Motion to Dismiss, p. 9) that the State court could have taken the view that no relief was appropriate until the Legislature had an opportunity to act in the light of anticipated decisions in the Reapportionment Cases then under submission before this Honorable Court misses the distinction pointed out in *Reynolds v. Sims, supra,* .... U. S. ...., 84 S. Ct., 1394, between *deciding* the case and the application of equitable principles in determining *whether immediately effective relief* should be granted. Where matters as important as the right to vote are the issue, the basic guarantees of the Constitution are warrants for the here and now. (*Watson v. City of Memphis*, 373 U. S. 526, 533.) Ever since the decision in *Baker v. Carr*, 369 U. S. 186, there has been no question but that the California senate districting system denied the equal protection of the laws to residents of the populous California counties. The question of what degree of change was required may have been in doubt until June 15, 1964; but that some major degree of change was necessary was clear, and no substantial or sufficient non-federal ground can explain the State court's action in failing to decide that issue.

In truth and fact, the issue before the California Supreme Court was a Federal issue. It could not even consider the case without considering the Federal issue. Suggestions that adequate State grounds existed to explain the State court's action are unsubstantial at best and speculative assumptions in any event.

III.

Appellants Have Met the Burden of Showing That the Action of the California Supreme Court Rested on a Federal Ground Insofar as That Can Be Done in a Case Where No Decision Was Filed in the State Court.

Appellee, in Point II of its Motion to Dismiss (pp. 9-14) correctly cites cases in support of the quoted principles of law, but appellee is mistaken as to the applicable principles.

This is not the usual case where both federal and non-federal questions have been raised in the State court, and where the decision might have been based on the non-federal ground. As pointed out in Point II-A of this brief, the only non-federal issue raised in the Petition was an alternate and severable part of the prayer for relief, and this issue by its nature, would never be reached by the State court unless it had first decided the Federal questions favorably to appellants' contentions.

Insofar as appellants' meeting the requirement of affirmatively showing that the California court passed upon the Federal question, it is submitted that the following is a correct statement of the applicable rule in this case:

> "... it is ... well settled that if the independent [non-federal] ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' [citations omitted.] Thus in Maguire v. Tyler, 8 Wall. (U.S.) 650, 19 L. ed 320,

and in Neilson v. Lagow, 12 How. (U.S.) 98, 110, 13 L. ed 909, 914, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. . . . We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intendment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial."

Williams v. Kaiser, 323 U. S. 471, 478-479.

The fact that, under California law, summary refusal of a court to issue a writ of mandate is not an adjudication on the merits (Motion to Dismiss, p. 11) does not make the court's action any less final in the sense of 28 U. S. C. 1257. The correct statement of the rule requiring finality is as follows:

"Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an

> effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."
>
> *Market Street Ry. Co. v. Railroad Commission*, 324 U. S. 548, 551.

It is clear that the action of the Supreme Court of California in denying the Petition for Writ of Mandate in the present proceeding is a final and complete disposition of that case so far as the State court is concerned. The fact that the action appealed from is not an adjudication of the merits of the case does not detract from the fact that the action is subject to no further review by a State court and is a complete disposition of that particular case.

When appellee contends that the issuance of an alternative writ of mandate is a matter within the discretion of the California courts, and governed by equitable principles (Motion to Dismiss, pp. 12-13), the statement is correct as a matter of the California law. But, as determined by California cases, where the equitable considerations are those surrounding important cases, such as those affecting statewide elections, and those affecting practically every citizen of the State, "proper public policy demands that this court entertain these proceedings." (*Perry v. Jordan*, 34 Cal. 2d 87, 91, 207 P. 2d 47.) Indeed, where equal protection of the laws is at issue, the right of a lower court to exercise its discretion by refusing to take prompt protective action has been frowned upon. (*Sweatt v. Painter*, 339 U. S. 629; *Sipuel v. Board of Regents*, 332 U. S. 631.) Where basic constitutional guarantees are the issue, equitable considerations should com-

pel the court to act rather than give it the discretion to withhold action for unexplained or unsubstantial reasons. As stated in *Watson v. City of Memphis*, 373 U. S. 526, 533:

> ". . . The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."

The fact that the civil rights discussed in the *Watson* case did not include the right to vote does not detract from the force of the statement of equitable policy. Discretion of a court is abused if it withholds its protection for insufficient reasons where constitutional rights are at stake.

Appellee (Motion to Dismiss, p. 14) states that he does not challenge the jurisdiction of the California court to act after the completion of the 1964 election. This, when taken in connection with statements on pp. B2 and B17 of the Motion to Dismiss, is an apparent concession as to the merits of appellants' cause. His only plea remaining is that 1964 elections should not be disrupted. But appellants did not base their cause of action on the pendency of a single election. Unless the relief prayed for is granted, not only the 1964 elections will be held under the invalid statute, but also the elections of 1966, 1968 and 1970. If it should be too late, or too disruptive, to grant immediately effective relief for the 1964 election, for what reason can the Court fail to provide judicial protection

for the elections which follow? For what reason can a petition seeking relief as to all future elections be denied in its entirety for the reason that it would be inconvenient to grant relief as to the first election?

It is submitted that the appellee's argument is based upon a misreading of the true nature of the petition, or it attributes to the California Supreme Court a totally inadequate non-federal ground as explanation of its failure to act.

Conclusion.

It is respectfully submitted that the Motion to Dismiss should be denied. Not only has the appellee wholly failed to suggest a single substantial and sufficient non-federal ground as the basis for the California court's summary denial of the Petition for Writ of Mandate, but the appellee has for practical purposes conceded that the appeal is meritorious in all respects except timing. The objection to timing has now been largely dispelled by reason of the fact that the California Supreme Court, on July 30, refused to entertain the new action brought by the appellants on June 19, 1964, and has indicated that it will be unavailing to bring any action for this purpose in a State court until the adjournment of the forthcoming session of the California Legislature. This will occur on or about June 11, 1965. It is submitted that this is an unreasonable delay in the adjudication of appellants rights, and a procedure which will in fact encourage the Legislature to extend the delay even further if possible.

The appeal should be granted and the matter referred back to the Supreme Court of California for further proceedings in accordance with the rulings in the Reapportionment Cases decided on June 15, 1964. Early decision on the merits is required so that Legislative relief will be promptly granted and not allowed to become bogged down in a miasma of dilatory maneuvering.

Respectfully submitted,

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